

## **REMARKS**

These amendments and remarks attend to all issues presented in the Office Action mailed December 7, 2007. Claims 5-9 and 11-16 are pending in the application.

Claims 5 and 8 have been amended to recite ‘...the composition or donut does not contain dried milk.’ Claim 13 has been amended to recite ‘adding a wheat protein isolate and omitting dried milk.’ Support for these amendments may be found, for example, in paragraphs [0051]-[0053] and FIGS. 1 and 3. Claim 16 has been amended to remove the phrase “...on a greased cooking surface.” No new matter has been added to the claims by these amendments.

### **Claim Rejections 35 U.S.C. § 112 – Written Description**

Claims 5-16 stand rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement. Specifically, the Examiner states that the phrases “less than about 1 wt% dried milk” and “substituting wheat protein isolate in the range of 0.5-10% for dried milk” are not supported by the original disclosure because the ranges now claimed are not disclosed (Office Action of December 7, 2007, p. 2).

Independent claims 5, 8 and 13 have been amended to specify that dried milk is omitted from the donut product or precursor composition. Products/precursors containing 0% dried milk are disclosed, for example, in paragraphs [0051] and [0053] and FIGS. 1 and 3.

With respect to claim 16, the Examiner states, “...the limitation of ‘baking said donut on a greased cooking surface’ is not disclosed in the specification. Paragraph 0032, discloses ‘in the preparation of the food product containing the wheat protein isolate, the food product would come in direct contact with oil; the cooking process would thereby employ frying or baking.’ This paragraph does not disclose at what stage the food product comes in contact with oil and there is absolutely no disclosure that the donut is baked on a greased cooking surface.” (Office Action of December 7, 2007, p. 2).

The phrase "...on a greased cooking surface" has been removed from claim 16. Applicants maintain, however, that the specification provides ample support for baking. The Merriam-Webster Online Dictionary defines "thereby" as "by that means". When this phrase is substituted in paragraph [0032], the paragraph reads: "In the preparation of the food product containing the wheat protein isolate, the food product would come in direct contact with oil. The cooking process would [by that means] employ frying or baking. Preferred for the practice of the present invention is frying as the cooking process." Clearly, the term "thereby" refers back to "the food product [coming into] contact with oil", and the stage of preparation referred to in the paragraph is the cooking process, which is mentioned explicitly in the second and third sentences.

Applicants submit that claims 5-16 meet the written description requirement of 35 U.S.C. § 112, first paragraph. Reconsideration and withdrawal of the 112 rejection is respectfully requested.

### **Claim Rejections – 35 U.S.C. § 103**

The following is a quotation from the MPEP setting forth the three basic criteria that must be met to establish a *prima facie* case of obviousness:

First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the references or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. MPEP §2142, citing *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

Claims 5-9, 11-14 and 16 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,403,610 granted to Murphy *et al.* (hereinafter, "Murphy").

Murphy discloses doughs and batters for producing reduced-fat and fat-free baked goods. The doughs and batters contain hydrated polysaccharide hydrocolloids and hydrated insoluble fiber, and optionally hydrated protein, such as wheat protein isolate or wheat gluten. The "hydrated polysaccharide hydrocolloids may be used in

place of fat at a rate of about one part hydrocolloid for each 40 to 60 parts of fat.” (col. 4, lines 44 - 46).

Murphy replaces fat with hydrated polysaccharides, and leaves milk solid concentrations unchanged relative to traditional baked goods. The minimum amount of milk solids used in Murphy’s examples is about 1.22 wt % (Example 3) – calculation based on the aqueous dispersion from Example 2 – and most of Murphy’s Examples include not only the aqueous dispersion from Example 2 but additional non-fat dried milk or liquid milk (which contains about 12% milk solids). In contrast, the presently claimed compositions do not contain dried milk.

The Examiner argues that “...[i]t would have been obvious to one skilled in the art to determine the optimum amount of dried milk depending on the type of product made and the nutritional profile desired. The amount used is a result-effective variable which can readily be determined by one skilled in the [art] through routine experimentation.” (Office Action of December 7, 2007, p. 3). There is, however, no teaching or suggestion within Murphy (or the general knowledge) to completely remove dried milk from a donut composition, where removal of dried milk may, for example, alter the organoleptic qualities of a food product, e.g., consistency and crumb qualities may be altered by the absence of coagulating milk proteins.

Murphy does not disclose compositions lacking dried milk, as required by amended claims 5, 8 and 13, and cannot support a case of *prima facie* obviousness. Withdrawal of the 35 U.S.C. § 103 rejection and reconsideration of claims 5-9, 11-14 and 16 is respectfully requested.

Claims 8, 9, 11 and 12 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 4,244,980 granted to Fischer *et al.* (hereinafter, “Fischer”) in view of Murphy.

Fischer discloses yeast-raised dough products that are economically advantageous because a portion of hard flour is replaced with bleached soft wheat flour and/or bleached clear flour. Due to the addition of sodium calcium alginate, the yeast-raised dough compositions have gas retention and structure forming properties comparable to those of compositions using hard wheat flour (col. 1, lines 49-54).

Like Murphy (discussed above), Fischer fails to disclose compositions that do not contain dried milk. Fischer's compositions are disclosed as containing "from about 1.5 to about 2.0 parts by weight of milk solids" (col. 3, lines 12-13). Further, routine experimentation would not lead one skilled in the art to completely remove dried milk from the compositions disclosed by Murphy and/or Fischer, as explained above.

Fischer and Murphy, alone or in combination, fail to disclose every element of Applicants' amended claims. For at least this reason, a *prima facie* case of obviousness cannot stand. Reconsideration and allowance of claims 8, 9, 11 and 12 is respectfully requested.

Claims 13-15 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Fischer in view of U.S. Patent No. 6,042,866 granted to Greene *et al.* (hereinafter, "Greene").

Greene discloses a composition for preparing instant fried noodles that includes a farinaceous base ingredient, a proteinaceous ingredient and water. The dough may be formulated "...so that is contains an added proteinaceous substance ingredient, such as gluten in particular, such as in an amount of up to and inclusive of about 5% by weight..." (col. 1, lines 50-53).

Neither Fischer nor Greene teach or suggest that dried milk be omitted from a donut composition, as required by amended claim 13 (and claims dependent thereon). Based at least on the absence of this element, a case of *prima facie* obviousness cannot stand.

Fischer and Greene, alone or in combination, fail to disclose every element of Applicants' amended claims and do not provide a teaching or suggestion for removing dried milk from a donut composition. Reconsideration and allowance of claims 13-15 is respectfully requested.


In view of the above Remarks, Applicants have addressed all issues raised in the Office Action dated December 7, 2007, and respectfully solicit a Notice of Allowance. Should any issues remain, the Examiner is encouraged to telephone the undersigned attorney.

Authorization to charge fees associated with a Request for Continued Examination is submitted herewith. If any additional fee is deemed necessary in connection with this Response, the Commissioner is authorized to charge Deposit Account No. 12-0600.

Respectfully submitted,

LATHROP & GAGE LC

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A handwritten signature in black ink, appearing to read "David J. Lee", written over a horizontal line.

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